BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRI L. CHOWNING	)	
Claimant	)	
VS.	)	
	)	Docket No. 255,917
CANNON VALLEY WOODWORK, INC.	)	
Respondent	)	
AND	)	
	)	
VIRGINIA SURETY COMPANY c/o CAMBRIDGE INTEGRATED SERVICES GROUP, INC.	)	
Insurance Carrier	)	

ORDER

Claimant appealed the March 15, 2002 Award entered by Assistant Director Kenneth J. Hursh. The Board heard oral argument on October 8, 2002.

APPEARANCES

David H. Farris of Wichita, Kansas, appeared for claimant. Jeff S. Bloskey of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges that she injured both upper extremities as the result of repetitive activities from April 2000 through her last day of working for respondent in May 2000.

In the March 15, 2002 Award, Assistant Director Hursh determined claimant sustained a 10.25 percent whole person functional impairment for her bilateral upper extremity injuries. But the Assistant Director denied claimant's request for a work disability (a permanent partial general disability greater than the functional impairment rating) after determining claimant's job loss and continued unemployment were not related to her injury

but, instead, were caused by respondent's business failure and a weak labor market. Accordingly, the Assistant Director limited claimant's permanent partial general disability to her functional impairment rating. The Assistant Director also determined claimant's average weekly wage for computing her benefits was $419.82, which represented $355.20 for straight time pay, $0.12 for overtime and $64.50 for employer-paid health insurance.

Claimant contends Assistant Director Hursh erred. Claimant contends the Assistant Director misinterpreted the law. Citing several Kansas Court of Appeals cases, claimant argues that she was entitled to receive a work disability when respondent ceased doing business, causing the loss of her accommodated job. Claimant also argues her average weekly wage was $455.83, which is based upon $355.20 for straight time, $23.63 for overtime and $77 for health insurance. Finally, claimant requests the Board to find that she has sustained a 28 percent task loss and a 100 percent wage loss for a 64 percent work disability.

Respondent and its insurance carrier also contend Assistant Director Hursh erred. They argue, among other things, (1) claimant failed to prove that she sustained any injury while working for respondent from April through May 2000, as she alleged; (2) claimant's symptoms were caused by her pregnancy or, at the very least, that her left upper extremity symptoms were caused by a different injury, which occurred in July 1999; (3) any injury to the right upper extremity was caused by something other than work; (4) if the Board determines that claimant did sustain a work injury to both upper extremities, claimant's injuries comprise two separate scheduled injuries; (5) claimant's work duties only caused a temporary aggravation of her symptoms; (6) if claimant is entitled to any permanent disability benefits, claimant should be compensated for only a five percent functional impairment to the right upper extremity; (7) in the event claimant sustained an "unscheduled" injury, claimant failed to prove she sustained any task loss; (8) claimant is not entitled to receive a work disability as she was not performing accommodated work when her job ended and, therefore, the presumption of no work disability cannot be rebutted; (9) after respondent ceased doing business, claimant did not make a good faith effort to find appropriate employment and she retains the ability to earn her pre-injury wages; (10) the Board should impute a post-injury wage of $360 per week, which is at least 90 percent of claimant's pre-injury wage; and (11) claimant's average weekly wage was $381.17, which is the sum of the stipulated base wage of $355.20 per week, plus $0.12 per week in overtime and $25.85 per week for health insurance.

The issues before the Board on this appeal are:

1. Did claimant sustain a series of repetitive mini-traumas that culminated in injuries to both upper extremities as a result of the work that she performed for respondent through May 2000?

2. If so, what is the appropriate date of accident?

3. What is claimant's average weekly wage for purposes of computing her workers compensation benefits?

4. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes, as follows:

1. Did claimant sustain a work-related injury to her upper extremities while working for respondent through May 2000?

Before closing its doors in May 2000, respondent manufactured cabinets. Claimant began working for respondent in March 1998 and, while only 5' 2" and 100 pounds, she worked on the company's assembly line. Claimant's assembly line job included, among other tasks, such duties as setting doors on cabinets, stapling cardboard on cabinets before shipping, setting rails for the cabinet drawers and assembling those rails. Assembling rails required claimant to forcefully strike parts to join them together. In approximately January 2000, claimant began experiencing upper extremity symptoms when she began feeling numbness and tingling in her hands and arms. After that, claimant's symptoms waxed and waned depending upon the work that she performed.

In early April 2000, claimant's symptoms increased after a day of assembling rails. The symptoms in claimant's left wrist increased to the point that she had difficulty using that hand. Also in early April 2000, claimant requested medical treatment. Because she was limited in using her dominant left hand, claimant began using her right hand much more to perform her job duties. As a result, claimant experienced increased symptoms, including pain, in the right wrist.

On April 5, 2000, claimant saw Dr. Pedro Murati to be evaluated for injuries to the ribs, back and neck that claimant had sustained in July 1999. At that examination, Dr. Murati discovered that claimant also had bilateral carpal tunnel syndrome. On April 10, 2000, claimant saw the company's physician, Dr. Phillip S. Olsen, for her upper extremity complaints and the doctor splinted claimant's left wrist. Dr. Olsen next saw claimant for a follow-up visit on April 17, 2000, and restricted her from using the left hand. The doctor also referred claimant to Dr. J. Mark Melhorn for treatment.

Because respondent could not accommodate the restriction of one-handed work only, claimant was off work while she awaited her appointment with Dr. Melhorn.

Claimant then saw Dr. Melhorn on May 11, 2000. Despite noting ongoing symptoms in both wrists and hands and having a history that claimant performed repetitive work handling 500 parts per hour, the doctor returned claimant to work with directions to rotate her tasks. Upon returning to work, respondent assigned claimant to work in its mill. But claimant found that work, which required her to catch parts coming out of a machine and stack them onto a cart, hurt her wrists. Consequently, she requested Dr. Melhorn to permit her to return to the assembly line where she might find a job that she could do.

The record is not entirely clear how many weeks claimant worked in April and May 2000 as she was off work due to respondent's inability to provide one-handed work and she also missed work due to a daughter's medical emergency. When the company ceased doing business on approximately May 18 or 19, 2000, claimant was off work as she was at a Kansas City medical center with her daughter. The record does not disclose the last date that claimant actually worked for respondent but it was sometime after the May 11, 2000 visit with Dr. Melhorn.

The record contains the opinions from three doctors as to whether claimant's upper extremity injuries were caused by her work. In letters dated May and June 2000, Dr. Melhorn, whose final diagnosis was not carpal tunnel syndrome but painful right and left upper extremities, indicated that claimant's work contributed to her condition. Dr. Murati, who was hired by claimant's attorney to evaluate claimant, testified that claimant had developed bilateral carpal tunnel syndrome that was a cumulative or repetitive use injury, which she sustained through the last day that she worked for respondent. Finally, Dr. C. Reiff Brown, who was also hired by claimant's attorney, testified that claimant's bilateral carpal tunnel syndrome was caused by performing repetitive upper extremity activities through the last day that she worked for respondent. Although the doctors' opinions were stated somewhat differently, all three opinions conclude that claimant's work activities either caused or contributed to her bilateral upper extremity injuries.

The Board concludes claimant sustained personal injury by accident arising out of and in the course of her employment while working for respondent through May 2000.

2. What is the appropriate date of accident for this repetitive use injury?

The Assistant Director determined that claimant sustained her upper extremity injuries through her last day of work for respondent in May 2000. The Assistant Director used May 18, 2000, as the appropriate date of accident for purposes of computing claimant's award. The Board agrees.

Claimant's testimony, coupled with the medical opinions, establish that it is more probably true than not that while working for respondent claimant performed repetitive work and hand-intensive activities through sometime in May 2000.

Following creation of the bright line rule in the 1994 *Berry*[1] decision, the appellate courts have struggled with determining the date of accident for repetitive use injuries. In *Treaster*,[2] which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* focused upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use injury is the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[3]
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> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[4]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury was the last day worked when the worker leaves work because of that injury.

In the case at hand, although she was experiencing ongoing symptoms claimant did not leave work due to her injuries. Instead, claimant lost her job when the company failed. When respondent ceased doing business in May 2000, respondent was attempting to accommodate claimant's injuries as it had moved her from the assembly line where she performed repetitive activities. That attempt to accommodate claimant's injuries was not succeeding, however, because the assigned work in the mill was hurting claimant's wrists due to its repetitiveness and the lifting it required.

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[1] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[2] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[3] *Id.* at Syl. ¶ 3.

[4] *Id.* at Syl. ¶ 4.

Based on these facts, the Board concludes that it is more probably true than not that claimant sustained repetitive mini-traumas to her hands and wrists through the last day that she worked for respondent despite respondent's attempts to provide accommodated work. The record does not establish the last day that claimant actually worked for respondent. Therefore, the Board adopts the May 18, 2000 date utilized by the Assistant Director for computing claimant's award as it is very close in proximity to the last day worked.

3. What is claimant's pre-injury average weekly wage?

The Assistant Director determined claimant's pre-injury average weekly wage was $419.82, which represented the parties' stipulated base wage of $355.20 per week, plus $0.12 per week for overtime and $64.50 per week for employer-paid insurance benefits. None of the parties agree with the Assistant Director's computation. As indicated above, claimant contends the correct overtime amount is $23.63 per week and the correct insurance benefit amount is $77 per week. Conversely, respondent and its insurance carrier agree with the Assistant Director's finding of overtime but they contend the correct insurance benefit amount is $25.85 per week.

Claimant testified that she paid $48 per week for health insurance, which was one-half the total premium. Claimant's pay stubs and the wage records from respondent that were stipulated into evidence corroborate claimant's testimony about the amount that she paid.

Based on claimant's uncontradicted testimony, the Board concludes that claimant paid approximately $48 per week for health insurance, which was one-half of the total premium. Consequently, the Board finds the weekly value of the employer-paid insurance for purposes of computing claimant's pre-injury average weekly wage is $48.

Regarding the overtime that claimant earned during her last 26 weeks of employment, the parties introduced records showing that claimant earned at least $614.17 in overtime for the 26-week period between October 3, 1999, and April 1, 2000. Consequently, the Board concludes claimant's average overtime earnings for computing the average weekly wage is $23.62.

Accordingly, the Board concludes claimant's pre-injury average weekly wage is $426.82, which represents $355.20 in base wages, $23.62 in overtime and $48 for insurance benefits.

4. What is the nature and extent of claimant's injury and disability?

The Assistant Director determined that claimant's permanent disability benefits were governed by K.S.A. 1999 Supp. 44-510e as claimant's injuries did not fall within the

schedules of K.S.A. 1999 Supp. 44-510d. But respondent and its insurance carrier argue claimant, if anything, has sustained either a scheduled injury to the arm or, in the alternative, separate scheduled injuries to both arms. The Board rejects both those arguments.

The Board agrees with the Assistant Director that claimant's permanent partial disability benefits are governed by K.S.A. 1999 Supp. 44-510e rather than the scheduled injury statute, K.S.A. 1999 Supp. 44-510d. The Board concludes that it is more probably true than not that claimant sustained simultaneous injuries to her hands and arms due to a series of mini-traumas through her last day of work. Although claimant's upper extremity symptoms manifested themselves at different times and in different degrees, both upper extremities sustained trauma simultaneously while claimant performed her work duties. Consequently, claimant's bilateral upper extremity injuries do not comprise, and should not be treated as, two separate scheduled injuries.

> Where a claimant's hands and arms are simultaneously aggravated, resulting in work-related injuries to both hands and arms, the injury is compensable as a percentage of disability to the body as a whole under K.S.A. 44-510e.[5]

When an injury does not fit within the schedules of K.S.A. 1999 Supp. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation**

[5] *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, Syl. ¶ 1, 947 P.2d 1 (1997).

> **in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[8]

And the Kansas Court of Appeals in *Watson*[9] recently held that the absence of a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that in such circumstances the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's ability to earn wages.

Nonetheless, the Assistant Director determined claimant's permanent partial general disability should be limited to her functional impairment rating as the Assistant Director determined claimant's injury was neither a factor in her losing her job nor being unable to find a new job. Claimant contends the Assistant Director misinterpreted the law. The Board agrees.

The Kansas appellate courts have consistently held that workers who return to accommodated work following a work injury are not deprived of a work disability if they later

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[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *Id.* at 320.

[9] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

lose their job due to an economic layoff. In *Lee*,[10] the Kansas Court of Appeals first held that a worker who returned to work following an injury earning a wage comparable to his pre-injury wage was entitled to receive a work disability after losing his job in a layoff. The Court of Appeals, after reviewing the history of the permanent partial general disability formula, stated in *Lee* that it was clear under the present version of the formula that the worker would not be entitled to a work disability as long as he worked for the employer, but once he stopped earning a comparable wage he could receive a work disability, subject to his ability to prove it. In its syllabus, the Court of Appeals stated:

> 1. The 1993 amendments to K.S.A. 1992 Supp. 44-510e(a) are merely the latest in a series of attempts by the legislature to ensure that a worker does not earn substantial post-injury wages while collecting work disability benefits. Thus, the 1992 version of the statute may be interpreted in light of the 1993 amendments.
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> 2. The 1993 version of K.S.A. 44-510e(a) eliminates the presumption of no work disability set out in K.S.A. 1992 Supp. 44-510e(a). Instead, it prevents permanent partial disability compensation in excess of functional impairment as long as the employee earns 90 percent of his or her pre-injury wage.
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> 3. It is not the intent of the legislature to deprive an employee of work disability benefits after a high-paying employer discharges him or her as part of an economic layoff where the employer was accommodating the injured employee at a higher wage than the employee could earn elsewhere.

In January 1998, the Kansas Court of Appeals decided *Gadberry*.[11] In that decision, the Court of Appeals held that a worker who returned to work at her pre-injury wage but within a few weeks was terminated in a layoff was not precluded from receiving a work disability award. Moreover, the Court of Appeals noted that there was no evidence that the employer was accommodating the worker with a light-duty job.[12] The Court stated, in part:

> Gadberry's return to work at the same wage that she had been receiving prior to her [January 21, 1994] injury does not preclude a finding of wage loss since she was given notice of her termination just a few weeks later, and the termination was based on an economic layoff. Pursuant to *Lee*, Gadberry became eligible for

[10] *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

[11] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[12] *Id.* at 804.

> compensation on a work disability upon her termination, one component of which is wage loss.[13]

In addressing whether the principles in *Foulk* should preclude claimant from receiving a work disability, the Court stated:

> Gadberry would have continued to work at Polk if she had not been terminated. The record reflects that Gadberry applied for retirement benefits subsequent to her termination because she needed health insurance. Even after she had applied for retirement benefits, Gadberry sought employment with numerous employers within the community. Gadberry did not refuse employment; it was never offered to her.[14]

Consequently, in *Gadberry* the Court of Appeals held that the worker was entitled to receive a work disability after she was terminated in an economic layoff despite returning to her regular work without accommodations.

In the 1999 *Niesz*[15] case, the Kansas Court of Appeals held that a worker was entitled to receive a work disability when the worker was later terminated for reasons unrelated to the work-related injury. In that decision, the Court of Appeals held that an accommodated job artificially circumvents a work disability but once that accommodated job ends, the presumption of no work disability may be rebutted.

> Placing an injured worker in an accommodated job artificially avoids work disability by allowing the employee to retain the ability to perform work for a comparable wage. Once an accommodated job ends, the presumption of no work disability may be rebutted.[16]

> The presumption of no work disability is subject to reevaluation if a worker in an accommodated position subsequently becomes unemployed.[17]

The Court of Appeals held that Ms. Niesz was entitled to receive a work disability after losing her job.

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[13] *Id.* at 805.

[14] *Id.* at 806.

[15] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

[16] *Id.* at Syl. ¶ 2.

[17] *Id.* at Syl. ¶ 3.

> Niesz performed accommodated work until she lost her job, as did the claimant in *Lee*. The fact that Niesz' accommodated position ended does not mean that Niesz ceased having work restrictions. Niesz' work disability made it difficult for her to find work in the open market. The presumption of no work disability does not apply because Niesz is no longer earning 90 percent of her preinjury wages. See K.S.A. 1998 Supp. 44-510e(a). . . .[18]

Finally, in January 2003 the Kansas Court of Appeals in *Cavender*[19] held that a worker who had obtained employment following a work injury was entitled to receive work disability benefits despite the fact that she resigned her employment for reasons unrelated to the injury. The Court reasoned that the proper test to apply in these cases is whether the worker has made a good faith effort to find appropriate employment. The Court wrote, in part:

> K.S.A. 44-510e(a) allows work disability in excess of functional impairment only if the claimant is making less than 90% of his or her preinjury gross weekly wage. If this percentage is met, K.S.A. 44-510e(a) provides the equation for computing work disability[.]
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> . . . .
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> The cases interpreting K.S.A. 44-510e have added the requirement that an employee must set forth a good faith effort to secure appropriate employment before work disability will be awarded.
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> The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. . . .[20]
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> . . . .
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> The purpose of the good faith test, at its very core, is to prevent employees from taking advantage of the workers compensation system. In situations where post-injury workers leave future employment, the good faith test is extended to determine whether leaving was reasonable. Clearly, in the cases cited by PIP, leaving employment was reasonable when the employment became outside physical restrictions or the changed circumstances justified a refusal of accommodated employment. However, the reasonableness of leaving employment is not limited to a decision based on work restrictions or injuries.

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[18] *Id.* at 740.

[19] *Cavender v. PIP Printing, Inc.*, ___ Kan. App. 2d ___, 61 P.3d 101 (2003).

[20] *Id.* at 103-104 (citations omitted).

> The present case is closest in nature, while still not on point, to those cases where an injured employee is terminated due to economic downturn and layoff and the employee is found to still be entitled to work disability. **Those cases present a situation where termination or leaving employment is unrelated to the workers compensation injury or restrictions.** . . .[21]

According to the above appellate court decisions, in determining permanent partial general disability, the question is not whether the worker's injury caused a layoff or termination from employment but whether the worker has made a good faith effort to find and retain appropriate employment. If the worker has made a good faith effort, then the actual difference in pre- and post-injury earnings is used in the permanent partial general disability formula. If the worker has not made a good faith effort, then a post-injury wage should be imputed. Consequently, not all workers who are earning less than 90 percent of their pre-injury wage are entitled to receive an award for work disability.

Moreover, contrary to the Assistant Director's finding that claimant's bilateral upper extremity injuries have not contributed to her unemployment, the Board concludes that such injuries have limited her employment opportunities and, therefore, have contributed to her unemployment. Claimant is now limited in her ability to work in certain assembly line settings or any other job that would require repetitive use of her upper extremities. The Board notes that the Assistant Director relied on the *Hernandez*[22] case, which is now a published decision. The Board, however, considering the evolution of the work disability formula and its interpretation by the appellate courts, concludes *Hernandez* is not applicable to situations where workers are laid off or where they lose their employment due solely to economic conditions. Instead, *Hernandez* is limited to those situations where a worker retains his or her employment but, however, sustains a wage loss that is shared by all fellow employees that is solely attributable to an economic downturn. *Hernandez* does not apply to those situations where a worker is out in the open labor market competing for jobs, saddled with a permanent injury.

Before working for respondent, in the 15-year period before developing her bilateral upper extremity injuries claimant worked as a switchboard operator and as a dietary aide/information desk clerk at a hospital, as a flagger for a construction company, as an assistant manager at a convenience store, as a cashier at both a fast food restaurant and a discount department store and worked for a telecatalog company. The latter two jobs were part-time positions, which claimant worked while performing other full-time jobs.

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[21] *Id.* at 105 (citation omitted) (emphasis added).

[22] *Hernandez v. Monfort, Inc.*, ___ Kan. App. 2d ___, 41 P.3d 886, *rev. denied* ___ Kan. ___ (2002).

After losing her job with respondent, claimant drew unemployment benefits and complied with the requirements of that program in seeking work. As part of her job search, claimant regularly looked for job leads in the El Dorado newspaper and a shopper's guide publication. Claimant has not applied for work at any temporary employment agencies but she has gone to the unemployment office to look for leads.

In addition to cashiering skills, claimant, who has a high school education, also has some bookkeeping skills from working in the convenience store, and skills answering telephones and light typing from working at the hospital. Accordingly, she has focused her job search on receptionist and secretarial jobs. But claimant has also applied for some other positions such as a cashier, teacher's assistant, turnpike toll worker, and at least one manufacturing job.

Claimant introduced into evidence a list of 126 contacts with potential employers that she had made between May 22, 2000, and August 6, 2001, trying to find work. Although the list is somewhat suspect as it only shows one contact for each day listed, claimant has established that she has made a good faith effort to find employment. The Board rejects respondent and its insurance carrier's argument that claimant has failed to make a good faith effort to find employment or that claimant has applied for the wrong type of jobs. In this instance, the Board finds it incongruous for respondent and its insurance carrier to argue claimant's job search efforts were inappropriate on one hand but on the other hand never attempt to assist claimant with vocational rehabilitation, job search, or other services.

Because claimant has established a good faith effort to find appropriate employment, her actual wage loss should be used for the disability formula. Consequently, as claimant was unemployed when she last testified in this claim, a 100 percent wage loss should be used for the wage loss prong.

The Board concludes claimant has lost the ability to perform 26 percent of the work tasks that she performed in the 15-year period before she developed her bilateral upper extremity injuries. That is a split of the 25 percent task loss opinion provided by Dr. Brown, who saw claimant in August 2001 and determined that claimant had lost the ability to perform approximately 11 of 44 former work tasks, and the 27 percent task loss opinion provided by Dr. Murati, who saw claimant in both April 2000 and January 2001 and determined claimant had lost the ability to perform approximately 12 of her 44 former work tasks.

The Board is aware that Dr. Melhorn indicated that claimant would have had a zero percent task loss as claimant allegedly needs no restrictions other than task rotation. But, in this instance, that opinion is not persuasive as it would not eliminate those activities that caused claimant's injuries in the first instance. Moreover, Dr. Melhorn had no idea if

claimant's former work tasks would have permitted any task rotation. When considering the entire record, the Board finds the task loss opinions of Dr. Brown and Dr. Murati the most credible and persuasive.

Averaging claimant's 100 percent wage loss with the 26 percent task loss yields a permanent partial general disability of 63 percent. Accordingly, the March 15, 2002 Award should be modified to increase claimant's permanent partial general disability from 10.25 percent to 63 percent.

The Board adopts the findings and conclusions set forth by the Assistant Director that are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the March 15, 2002 Award and increases both claimant's average weekly wage and the permanent partial general disability rating from 10.25 percent to 63 percent.

Terri L. Chowning is granted compensation from Cannon Valley Woodwork, Inc., and its insurance carrier for a May 18, 2000 accident and resulting disability. Ms. Chowning is entitled to receive 3.57[23] weeks of temporary total disability benefits at $236.81 per week, or $845.85, plus 261.45 weeks of permanent partial general disability benefits at $284.56 per week, or $74,398.21, for a 63 percent permanent partial general disability, making a total award of $75,244.06.

As of March 10, 2003, there is due and owing to Ms. Chowning 3.57 weeks of temporary total disability compensation at $236.81 per week in the sum of $845.85, plus 146.57 weeks of permanent partial general disability compensation at $284.56 per week in the sum of $41,707.96, for a total due and owing of $42,553.81, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $32,690.25 shall be paid at $284.56 per week until paid or until further order of the Director.

The Board adopts the remaining orders in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

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[23] The parties agreed that $845.85 was paid in temporary total disability compensation. Dividing that amount by the compensation rate of $236.81 equals 3.57 weeks, rather than the 3.75 weeks as noted in the Award.

Dated this ____ day of March 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Assistant Director
Director, Division of Workers Compensation